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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANSOM THEODORE SPURLOCK, *et al.*,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY AND
KERR-McGEE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether a mineral reservation clause contained in deeds executed by Santa Fe Pacific Railroad Company ("Santa Fe"), a corporation chartered by an 1897 Act of Congress, conveying railroad lands granted under Section 3 of the Act of Congress of July 27, 1866 ("Section 3 grant lands"), is void and unenforceable because the Section 3 grants, and all related rights, were transferred by operation of law to the Atchison, Topeka and Santa Fe Railway Company ("ATSF") in 1903 as a result of: (1) the Act of Congress of June 27, 1902, authorizing a transfer of Santa Fe's railroad and other property, including all rights, grants and franchises, to ATSF; (2) the express intent of Congress that the Section 3 grant lands or proceeds from their sale were to remain with and in aid of the railroad transferred to ATSF; and (3) limits on corporate purpose and power in Santa Fe's charter.

2. Whether the court of appeals' holding, that the reservation of "minerals" in Santa Fe's deeds conveying Section 3 grant lands is unambiguous as determined solely by reference to the clause itself, must be overturned because it is in conflict with decisions of this Court that, as a matter of law, the word "minerals" when used in a reservation clause with respect to conveyance of lands is ambiguous *per se* and makes necessary resort to other evidence of intent.

3. Whether the presiding judge's failure to recuse himself resulted in denial of due process to the petitioners as guaranteed by the Constitution of the United States, where the presiding judge of the Court of Appeals of the State of Arizona had extensive personal knowledge of material disputed evidentiary facts concerning the proceedings from prior legal representation, and where upon receipt of a suggestion of recusal the judge undertook an out-of-court examination in his former law firm's offices (which firm represented respondent Kerr-McGee Corpora-

tion until shortly before trial) of files covering his prior involvement, which files had not been produced pursuant to petitioners' earlier subpoena *duces tecum* served on the law firm.*

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* The following were plaintiffs and counterdefendants in the Superior Court of Apache County, Arizona and appellees in the Court of Appeals of the State of Arizona: Ransom Theodore Spurlock, Vernie Maria Spurlock, Charles Patrick Spurlock, and Nancy Jeneen Spurlock. The following were defendants and counterclaimants in the Superior Court of Apache County and appellants in the Court of Appeals of the State of Arizona: Santa Fe Pacific Railroad Company, a corporation; and Kerr-McGee Corporation, a Delaware corporation.

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SANTA FE PACIFIC RAILROAD COMPANY AND KERR-McGEE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

Petitioners Ransom Theodore Spurlock, *et al.* (hereinafter "the Spurlocks"), petition for a writ of certiorari to review the decision of the Court of Appeals of the State of Arizona in this case.

OPINIONS BELOW

The opinion of the court of appeals, —— Ariz. App., ——, 694 P.2d 299 (1984), is set forth in Appendix A ("App. A") to this petition at 1a-31a. The Judgments of the Superior Court of Arizona, Apache County, are set forth in Appendix B ("App. B") to this petition at 32a-64a.

JURISDICTION

The decision of the Court of Appeals for the State of Arizona was entered on October 18, 1984. A timely petition for review was filed with the Supreme Court of the

State of Arizona. An order denying the petition for review (App. C at 65a) was entered on January 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States; the Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292 ("Atlantic & Pacific Act" or "1866 Act"); the Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19 ("1871 Act"); the Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622 ("Santa Fe Railroad Act" or "1897 Act"); the Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405 ("Atchison Topeka Act" or "1902 Act"); Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898, 954-55, *amended by* Act of December 12, 1945, Pub. L. No. 256, 59 Stat. 606 (codified as amended at 49 U.S.C. § 10721 (1982)). These Acts and provisions are set forth in App. F at 69a-92a.

STATEMENT OF THE CASE

The dispute between the Spurlocks and Santa Fe Pacific Railroad Company ("Santa Fe") and Kerr-McGee Corporation ("Kerr-McGee") involves a mineral reservation clause affecting over four million acres in Arizona and New Mexico granted by Congress in 1866 to the Atlantic & Pacific Railroad Company ("Atlantic & Pacific"), Santa Fe's predecessor in interest. As demonstrated below, the various congressional enactments treating Santa Fe's corporate purpose and powers render the reservation clause void and unenforceable. For proper context, a brief summary of relevant legislation is set forth below.

1. In the second half of the nineteenth century, to provide for development of the western part of the country, Congress created numerous railroad corporations and granted them tens of millions of acres of public lands.

"The primary purpose sought by Congress in making the land grants was accomplished by the construction and operation of the roads and the development of the territories they served." H.R. Rep. No. 1910, 77th Cong., 2d Sess. 4 (1942). By Act of Congress of July 27, 1866, ch. 278, 14 Stat. 292, Congress chartered one such corporation, the Atlantic & Pacific, to construct, maintain and operate a railroad and telegraph line from Missouri to the Pacific Coast, generally along the thirty-fifth parallel. Section 3 of the Atlantic & Pacific Act provided for a large grant of lands in New Mexico and Arizona to aid in construction and operation of the railroad.[1]

By 1871, the Atlantic & Pacific was encountering difficulties in financing its venture,[2] and Congress granted to it the power to borrow funds and secure the loans with mortgages of its railroad and other property. Act of Congress of April 20, 1871, ch. 33, 17 Stat. 19. By 1896, however, the Atlantic & Pacific was unable to service the debt it incurred under the authority of the 1871 Act. Its Western Division, completed in 1885, was under protection of a committee of trustees with foreclosure proceedings pending. *See* S. Rep. No. 737, 54th Cong., 1st Sess. 2 (1896).

In response to this situation, the Atchison, Topeka and Santa Fe Railway Company ("ATSF") requested Congress to create a new federal corporation, to be funded by ATSF and which in turn would purchase at foreclosure, for $10.6 million, all assets of the Western Division, free and clear of all Atlantic & Pacific debts. 29 Cong. Rec. 1315, 1320 (1897). By Act of Congress of March 3, 1897, ch. 374, 29 Stat. 622, Congress created

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[1] The full text of Section 3 of the 1866 Act is set forth in App. F at 72a-74a.

[2] Congress "assumed that the road would be built by popular subscription, and the sole direct authority given to raise funds for that purpose was the authorized issuance of $100,000,000 of its capital stock." S. Rep. No. 737, 54th Cong., 1st Sess. 1 (1896).

and chartered Santa Fe, which acquired all assets of the Western Division of the Atlantic & Pacific. Section 1 of the 1897 Act granted to Santa Fe "the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation, granted by the Act of Congress approved [July 27, 1866], incorporating the Atlantic and Pacific Railroad Company." 29 Stat. 622. Section 1 of the 1897 Act also provided that Santa Fe would "be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject under its charter or Act of Incorporation," including those relating to its status as a post and military route and the hauling of government freight and personnel at reduced rates. *Id.*

For approximately six years beginning in 1897, Santa Fe maintained and operated the railroad in the Western Division. In 1903, however, Santa Fe terminated its business as a railroad company and ceased all activity operating the railroad. In particular, by Act of Congress of June 27, 1902, Pub. L. No. 177, 32 Stat. 405, Santa Fe was authorized to and did transfer its railroad and other property, together with all of its rights, powers, privileges, grants and franchises, to ATSF.[3] The 1902 Act, like the 1897 Act, continued the duties and obligations of the original 1866 Act creating the Atlantic & Pacific.[4]

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[3] In 1902, ATSF held all of the capital stock and bonds of Santa Fe, and the proposed transfer was seen as a means of minimizing office and accounting expenses. In addition, the public would be aided because, as a result of the transfer, it would have to deal only with a single company operating the entire length of the "transcontinental Atchison, Topeka and Santa Fe Railway System." H.R. Rep. No. 1518, 57th Cong., 1st Sess. 1 (1902).

[4] Section 1 of the 1902 Act provided that ATSF would take the railroad and other property of Santa Fe

> subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall

On September 10, 1902, the Santa Fe Board of Directors adopted resolutions accepting the 1902 Act [5] and approving an Agreement dated June 30, 1902, providing that Santa Fe "agrees to convey its property to The ATSF and Santa Fe Railway Company." App. G at 93a-94a. On May 6, 1903, the Board authorized the approval of a deed "conveying all the railroad and other property, including all rights, powers, privileges, grants and franchises of [Santa Fe] to The Atchison, Topeka and Santa Fe Railway Company." App. H at 96a. *See also*, App. I at 97a. On July 1, 1903, such a deed was executed and conveyed to ATSF. App. J at 109a. Concurrently, Santa Fe ceased operating as a railroad.

At the same time it implemented the 1902 Act, Santa Fe attempted to execute a scheme directed to the Section 3 land grants under the original 1866 Act. On May 6, 1903, while Santa Fe's Board was approving the deed to ATSF, it also authorized the approval of a second deed conveying to "the Santa Fe Pacific Development Company the rights of [Santa Fe] under Section 3 of the Act of Congress approved July 27, 1866." App. H at 95a. Santa Fe Pacific Development Company ("Santa Fe Development") was a newly formed subsidiary corporation owned and controlled by Santa Fe.

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be binding upon said Santa Fe Pacific Railroad Company as fully as though such sale or lease had not been made.

32 Stat. 405. Additionally, Section 1 of the 1902 Act perpetuated the public purposes and conditions of the 1866 Act by providing:

> That said railroad shall remain as heretofore a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation, and subject also to all other rights of the United States.

32 Stat. 405.

[5] The 1902 Act was elective — Santa Fe was compelled to make the transfer by January 1, 1904 or the authorization of the Act became inoperative. 32 Stat. 405.

The Board directed that the deed to ATSF was not to be executed until after the Section 3 land grants were deeded to Santa Fe Development. App. H at 96a. The Board intended that, when Santa Fe deeded "all the railroad and other property, including all . . . grants" to ATSF, it would not be holding, and thus would not pass, title to any Section 3 grants. On May 30, 1903, Santa Fe executed the deed to Santa Fe Development purporting to convey the entirety of its Section 3 rights. App. I at 109a. Subsequently, on March 11, 1904, Santa Fe caused Santa Fe Development to execute a deed reconveying the rights under Section 3 of the 1866 Act to Santa Fe. App. K at 118a. Since that time in 1903, Santa Fe's business has been, not that of operating a railroad, but rather of land development and real estate.

2. Between 1947 and 1951, over 4,000,000 acres of land in Arizona and New Mexico originally granted to the Atlantic & Pacific pursuant to Section 3 of the 1866 Act were sold. The deeds conveying the land to the purchasers were executed by Santa Fe. Each of the deeds was nearly identical and contained a clause purporting to reserve to Santa Fe "all oil, gas, coal and minerals whatsoever." [6] The Spurlocks' parents purchased 70,000 acres of this land subject to the reservation clause.

In 1973, a dispute arose between the Spurlocks and Santa Fe concerning the ownership of helium deposits located in the Navajo Springs geological formation partially underlying the 70,000 acres of land. Kerr-McGee, under agreements with Santa Fe's lessees, was removing the helium to which the Spurlocks claimed title. In 1973, the Spurlocks filed suit in the Superior Court of Apache County for conversion of the helium and seeking to quiet title to the helium. Santa Fe then filed five separate lawsuits against the Spurlocks claiming title under the min-

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[6] The full text of the mineral reservation clause is set forth in Exhibit B, ¶ 1, to the Judgment of the Superior Court of Arizona, Apache County, App. B at 44a.

eral reservation clause to the clay, petrified wood, helium, nitrogen, and potash. In response to a claim by Santa Fe, the Spurlocks also filed a separate quiet title action with respect to the sand and gravel on their ranch lands.[7] The various suits were consolidated for trial or other disposition.

The Spurlocks' claim to the various substances was based on the unenforceability of the mineral reservation clause. Specifically, the Spurlocks believed that Santa Fe's scheme to attempt to negate the intent of Congress in authorizing the transfer of the complete holdings of Santa Fe to ATSF in the 1902 Act was ineffective, the grant lands in fact passed to ATSF in 1903, and Santa Fe's attempt to reserve mineral rights in such lands to itself was void and unenforceable. The Spurlocks also maintained that, even if Santa Fe could reserve to itself an interest in the grant lands, the proper interpretation of the ambiguous language of the mineral reservation clause was that the disputed substances were not intended by the parties to be reserved. Rather, title passed to the Spurlocks.

Following jury trial, the trial court found as a matter of law that the mineral reservation clause was void and unenforceable. App. B at 36a. The trial court's judgment also reflected jury findings that the parties did not intend the reservation clause to include helium, nitrogen, clay, petrified wood, or potash.[8] App. B at 37a, 53a, 58a,

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[7] Santa Fe's claim to the sand and gravel was based on a separate clause of the deeds providing for the use of such materials for railroad purposes. *See* App. B at 44a, ¶ 2.

[8] The jury found that there was a custom and usage of which the parties were aware and which they intended to incorporate into the deeds. Consequently, the clause "all oil, gas, coal, and minerals whatsoever" was intended to include only hydrocarbons — substances organic in origin, with a chemical composition of hydrogen and carbon compounds, used for fuel — and minerals produced as a component or constituent thereof. App. B at 37a.

63a. Thus, the jury found that the helium had been unlawfully converted and awarded the Spurlocks compensatory damages of $914,807, and punitive damages of $20,487,732.[9] App. B at 34a, 38a.

The court of appeals reversed all except that portion of the judgment quieting title to the sand and gravel in the Spurlocks.[10] The appellate court found that judgment should have been entered as a matter of law in favor of Santa Fe and Kerr-McGee under the mineral reservation clause. App. A at 4a. The court determined "to treat the term minerals as unambiguous" as a matter of law thus requiring determination only of a general intent of the parties to the deeds, without the aid of extrinsic evidence. App. A at 14a. Relying on the recent decision of this Court in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), and a 1938 Kentucky case, *Maynard v. McHenry*, 271 Ky. 642, 113 S.W.2d 13 (1938), the court found the general intent of the parties to be that Santa Fe reserved "all commercially valuable substances separate from the soil" so that the Spurlocks held rights only to use and enjoy the surface estate. App. A at 14a.

The appellate court also overruled the trial court's judgment that the reservation clause was void and unenforceable as a matter of law. Finding "no federal au-

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[9] Also in accord with these findings, the jury advised that title should be quieted in favor of the Spurlocks with respect to helium, nitrogen, clay, petrified wood, and potash. In addition, the jury advised that title to the sand and gravel should be quieted in favor of the Spurlocks, Santa Fe having abandoned any right it had to use the substances for railroad purposes. The trial court, agreeing with the advisory opinions of the jury, quieted title in favor of the Spurlocks with respect to all the disputed substances. App. B at 37a-38a, 49a, 54a, 59a, 64a.

[10] The appellate court affirmed this portion of the decision because Santa Fe did not raise "any issue concerning error with regard to this finding." App. A at 20a.

thority granting to the states the power to dissolve Santa Fe Pacific" (App. A at 24a), the court held that the Spurlocks "may not challenge the legal existence of Santa Fe nor complain that the conveyances were *ultra vires*." App. A at 22a.[12]

The court of appeals recognized the Spurlocks' contentions that, pursuant to the 1902 Act, "Santa Fe was required to convey the lawsuit lands to [ATSF]" and therefore "could not have been the legal owner of these lands" entitled to reserve to itself any interest in the lands. App. A at 21a-22a. The court's decision upholding the enforceability of the reservation clause impliedly rejected these arguments as well.[13]

REASONS FOR GRANTING THE PETITION

Between 1866 and 1902, Congress carefully crafted a statutory framework for development of western lands, supported by construction and operation of the railroad. The opening of the West and railroad construction on the frontier are no longer central. But continued land development in the West remains immensely important. The statutory framework in the 1866, 1897, and 1902 Acts has a controlling effect on land use issues today and it remains essential that courts correctly interpret the statutes that Congress intended to govern disposition of these lands and their mineral rights.

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[12] Having found that the Spurlocks could not challenge the corporate existence of Santa Fe, the court went on to state that the 1902 Act did not effect a *de jure* dissolution of Santa Fe (App. A at 24a) and the evidence indicated that Santa Fe engaged in some form of business generally from 1897 to the present. App. A at 25a. The court made no finding as to whether Santa Fe was engaged throughout this time in the business of operating a railroad.

[13] Nowhere in its decision did the court of appeals expressly address these arguments. The appellate court's discussion of the 1902 Act was limited to a determination of whether the language of the Act effected a corporate dissolution of Santa Fe. *See* App. A at 23a-24a.

This case presents a state court's fundamental misinterpretation of the 1866-1902 congressional scheme. The error is compounded by the Arizona Court of Appeals' disregard of constitutionally based limitations on the powers of federal corporations, which are wholly creatures of Congress. This case is therefore significant to the preservation of a statutory scheme that continues to play a central role in development of western lands and exploitation of rich mineral resources. Only this Court is in a position to redirect the course of interpretation that is commanded by unambiguous congressional intent.

Ultimately at stake are mineral rights in over 4,000,000 acres in New Mexico and Arizona.[14] Under the decision below, these rights will vest in Santa Fe, a federal corporation no longer fulfilling its limited pur-

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[14] The 70,000 acres of land held by the Spurlocks are but a small portion of the over 4,000,000 acres of grant lands sold by Santa Fe in the late 1940s and early 1950s subject to the mineral reservation clause at issue here. The decision in this case has a potential adverse impact upon the use and enjoyment of the entire 4,000,000 acres. For example, the outcome of this case may have a serious detrimental impact on land titles and acquisitions in the Grand Canyon National Park and Lake Mead National Recreation Area. More than 70,000 acres of land in those areas are encumbered with the Santa Fe mineral reservation clause. The National Park Service (the "Service") has acquired some of this acreage subject to the reservation clause but is unable to obtain final title opinions until the matter of the reservation is resolved. There are ongoing negotiations with respect to the Service acquiring some or all of the remaining acreage. Although negotiations between the Service and Santa Fe have been ongoing since the late 1970s with regard to the mineral reservation in these lands, they have not been successful because Santa Fe has taken the position that its land rights in the Grand Canyon and Lake Mead properties have substantial value of up to $500 per acre as of 1978. This value of the mineral reservation is based on the position that the reservation clause is enforceable and that Santa Fe is entitled not only to currently known substances, but to valuable substances of any nature discovered any time in the future. This is also the position by the court of appeals.

pose of operating a railroad. This important decision of first impression will rend carefully structured interrelationships among the Acts of Congress governing Santa Fe's creation, purpose, and powers.

I. The Section 3 Grants Were Transferred to ATSF in 1903 by Operation of Law.

The principal question presented in this case is whether the Section 3 grant lands and all related rights were transferred to ATSF by operation of law as a result of the 1902 Act and Santa Fe's 1903 transfer to ATSF of all of its railroad and other property, including all rights, powers, privileges, grants and franchises. Contrary to the decision of the court of appeals, Santa Fe could not, by transferring the Section 3 grants to Santa Fe Development prior to the transfer to ATSF, and then transferring them back to itself, retain the grant lands. Such action violated: (1) the language and intent of the 1897 Act and the 1902 Act; (2) the intent of Congress that the Section 3 grant lands were to remain with and in aid of the railroad; and (3) the corporate purposes and powers of Santa Fe's incorporating charter as enacted by Congress.[15]

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[15] The court of appeals incorrectly determined that the Spurlocks could not challenge the acts of Santa Fe as being without its corporate powers as conferred by Congress. Initially, the court focused on the wrong inquiry. The question is not whether a state has the power to dissolve a federal corporation. Indeed, the court of appeals recognized as much by concluding that "[t]he state courts must, therefore, look to federal law to determine whether a national, congressionally incorporated corporation, has been dissolved *de jure*." App. A at 23a. The court of appeals then incorrectly applied federal law in deciding whether the reservation clause was void and unenforceable.

The appellate court's conclusion that the Spurlocks are not entitled to challenge the reservation clause is also based on an incorrect statement of the findings of the trial court, *i.e.*, Santa Fe was *de jure* and *de facto* dissolved, therefore its acts were *ultra vires*. *See* App. A at 26a. Such is not the case; they were alterna-

1. The 1897 Act and the 1902 Act demonstrate that the 1903 transfer of the grant lands by Santa Fe to Santa Fe Development was ineffective for any purpose because the grant land rights under Section 3 of the 1866 Act became vested in ATSF in 1903. In 1897, when Congress chartered Santa Fe to acquire all the assets of the Atlantic & Pacific, including the Section 3 land grant rights, Congress intended Santa Fe to be the successor corporation to the Atlantic & Pacific, assuming all of its rights and obligations and fulfilling all of the purposes of the original 1866 Act. Section 1 of the 1897 Act expressly set forth the rights and correlative duties of Santa Fe:

> [It] shall have and shall be entitled to hold and possess *the franchises and property so sold, and to exercise the same rights, powers, privileges, grants and franchises,* including the franchise to be a cor-

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tive findings. Spurlocks' position is that, regardless of the corporate existence of Santa Fe, it was outside its corporate powers to sever the Section 3 grant rights from the railroad and retain them for itself. Thus, the Spurlocks are not, as the court of appeals states (App. A at 27a), questioning any right Santa Fe had "to exercise the corporate franchise or powers" conferred on it by Congress, just its right to go beyond those powers. Therefore, the authority relied upon by the court is wholly inapplicable. To the contrary, parties in interest, such as the Spurlocks, are entitled to challenge the acts of corporations, such as Santa Fe, as being outside the powers of the corporation as granted by Congress in the chartering act. *See, e.g., Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 40-53 (1891) (collecting cases).

In addition, contrary to the appellate court, estoppel does not apply to prevent the Spurlocks from challenging the reservation clause as void and unenforceable. This Court has repeatedly announced the rule that a void act or deed cannot form the basis for an estoppel because the void act or deed is not merely voidable, it is absolutely void and cannot be made good by ratification. *See Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669 (1914); *Starr v. Long Jim*, 227 U.S. 613 (1913); *Louisville, N.A. & C. R. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899); *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24.

> poration, granted by the Act of Congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company . . . such new *company shall be subject to all the obligations and duties to the United States which said Atlantic and Pacific Railroad Company was subject* under its charter or Act of incorporation . . . .

14 Stat. 292 (emphasis supplied).[16] Thus, Santa Fe was created as a federal corporation and its charter powers and purposes were the same as those set forth in the original 1866 Act.[17]

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[16] The legislative history of the 1897 Act also demonstrates that Santa Fe was intended to be the successor corporation to the Atlantic & Pacific:

> [The 1897 Act] will accomplish all the purposes desired, primarily and fully protecting all interests of the United States and giving to the mortgagees and purchasers at foreclosure sale the right to become a Federal corporation, *taking all the existing rights and franchises of the original company, as well as all its obligations to the Government, as provided for in the original charter act.*

S. Rep. No. 737, 54th Cong., 1st Sess. 3-4 (1896) (emphasis supplied).

[17] ATSF had requested that the transfer of the Atlantic & Pacific assets be to a federal corporation, as opposed to itself, a state chartered corporation, in order to obtain the benefits at that time of the status as a federal corporation. The request evoked expressions of concern, especially in light of abuses by the land grant railroads, including the Atlantic & Pacific, which had impaired the public purposes of the railroads. *See, e.g.*, 29 Cong. Rec. 1315, 1320, 1325 (1897). The 1897 Act was passed in this setting of many years of unsatisfactory experience with the land grant railroads. Thus, in order to protect the public interest against further abuse, Congress carefully stated its intention that Santa Fe assume and carry out the original purpose of the 1866 Act:

> [T]he original purpose of Congress is continued unimpaired, and the corresponding benefits and the use of the road for national purposes and regulation of charges therefor are preserved both for the road as now constructed and that which may be hereafter built.

S. Rep. No. 737, 54th Cong., 1st Sess. 3 (1896).

Five years later, in the 1902 Act, Congress authorized a second succession, this time from Santa Fe to ATSF. As with the 1897 Act, Congress protected the public interest by expressly stating that the rights and obligations of the successor corporation in the transfer were to be the same as those of the predecessor. ATSF was to have the same rights and obligations as Santa Fe under its charter, which in turn were the same as those of the Atlantic & Pacific under the original 1866 charter. Indeed, the operative language of the 1902 Act is nearly identical to that of the 1897 Act:

> [Santa Fe is] authorized and empowered to sell or lease its *railroad and other property, including all rights, powers, privileges, grants, and franchises,* to the Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, its successors and assigns; but such *purchaser or lessee shall take, hold, and use* the railroad and property sold or leased *subject to all duties, obligations, conditions, and restrictions relating thereto which at the time of such sale or lease shall be binding upon said Santa Fe Pacific Railroad Company* as fully as though such sale or lease had not been made; and thereupon such purchaser or lessee shall have and enjoy all rights, powers, privileges, grants, and franchises relating to said railroad and property, or any part thereof, that were conferred by Congress upon said Santa Fe Pacific Railroad Company . . . .

32 Stat. 405 (emphasis supplied).[18] In each instance the successor corporation was to assume all rights and obligations of the predecessor corporation. It necessarily follows that Congress contemplated that the transfer authorized by the 1902 Act was to be of the *entirety* of the railroad and other property of Santa Fe, including

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[18] By reason of Santa Fe's election to transfer outright its railroad and other property to ATSF, the authorization to lease was rendered inoperative.

the Section 3 grants.[19] Congress would not have granted to ATSF all of Santa Fe's rights, nor imposed upon it all of Santa Fe's obligations, absent the intent that ATSF receive the whole of Santa Fe's railroad and other property.[20]

Under the 1902 Act, the Section 3 grants could have been transferred only to ATSF, and not to Santa Fe Development. The purported deed from Santa Fe to Santa Fe Development conveyed nothing because such a transfer would have been directly contrary to the operation of the 1902 Act. In turn, the 1903 deed from Santa Fe to ATSF, reciting that Santa Fe "has . . . sold . . . to the Atchison Company . . . all and singular, the railroad and other property, including all rights, powers, privileges, *grants* and franchises of the Santa Fe Pacific Company," App. J at 111a, passed to and vested in ATSF all of the Section 3 rights and grants.

2. In addition to the clear intent of the 1902 Act that the grant lands pass to ATSF, Congress repeatedly recognized the multiple purposes and conditions attendant to these grants of public lands. Congress intended that the grant lands (or revenues or proceeds therefrom) would remain with the railroad in order that statutory conditions and congressional purposes might be fulfilled.

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[19] Santa Fe recognized this congressional intent. The deed from Santa Fe to ATSF was drafted to track the "whole of the property" language of the 1902 Act. *See* App. J at 111a. However, Santa Fe did not allow the transfer to ATSF to take place until the grant lands had been removed temporarily from the whole of Santa Fe's property. *See* App. H at 96a.

[20] *See Chambers v. Atchison, T. & S. F. R. Co.*, 32 Ariz. 102, 255 P. 1092, 1092-1093 (1927) ("[t]hrough various mesne conveyances, the complete holdings of the Atlantic & Pacific Railroad Company became the property of plaintiff herein, the Atchison, Topeka & Santa Fe Railway Company, on July 1, 1903, and . . . they have remained such since that time.").

A wholesale severance of the lands from the railroad was not permitted.

The grant of public land to a railroad by an act of Congress constitutes a law, as well as a contract between the government and the railroad. The intent of Congress in making the grant must be fulfilled. In addition, the conditions of the grant in the contract must be met. *See, e.g., Wisconsin C. R. Co. v. Forsythe*, 159 U.S. 46 (1895); *Winona & St. P. R. Co. v. Barney*, 113 U.S. 618 (1885). As stated in *Santa Fe P. R. Co. v. Ickes*, 153 F.2d 305 (D.C. Cir. 1946), *rev'd on other grounds sub nom. Krug v. Santa Fe P. R. Co.*, 329 U.S. 591 (1947):

> The rights accruing to the railroad under such a grant are contractual; the railroad receiving the land in return for building and operating a line. *Burke v. Southern Pac. R. Co.*, 234 U.S. 669, 680, 34 S.Ct. 907, 58 L.Ed. 1527.

153 F.2d at 308.

There is no question that the primary purpose of Congress in creating the land grant railroads was to further settlement and development of the West. It was intended that grants of public land would aid in construction and operation of these railroads. *See* H.R. Rep. No. 1910, 77th Cong., 2d Sess. 4 (1942).[21] This purpose could be achieved only if the railroads, once built, were maintained and operated so that there could be a constant, efficient flow of goods and people back and forth to the West. Thus, the grant lands were to remain with the railroad in order that the lands, and revenues and

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[21] The House Committee on Interstate and Foreign Commerce, discussing the history of the land grant acts, stated:

> The primary purpose sought by Congress in making the land grants was accomplished by the construction and operation of the roads *and* the development of the territories they served.

H.R. Rep. No. 1910, *supra*, at 4 (emphasis supplied).

proceeds therefrom, could be dedicated to both construction and continued operation of the road.[22]

Another major condition of the land grants was that requiring the land grant railroads to transport Government personnel and freight without charge or at reduced rates. *See Krug v. Santa Fe P. R. Co.*, 329 U.S. 591 (1947). By the Act of Congress of June 7, 1924, ch. 291, 43 Stat. 447, 486, Congress provided that rates, not to exceed 50 percent of the public rates, would be established for

> any railroad which was aided in its construction by a grant of land *on condition* that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation . . . . (emphasis supplied)

The 1866 Act creating the Atlantic & Pacific contained these "land-grant rate obligations." *Krug v. Santa Fe*, 329 U.S. at 594-95. *See also, Chapman v. Santa Fe P. R. Co.*, 198 F.2d 498, 503 (D.C. Cir. 1951) (dissent),

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[22] In 1977 the Interstate Commerce Commission reaffirmed that the grant lands were intended to stay with the railroads:

> We are particularly concerned that lands which were granted by the Federal Government to railroads to enable them to fund the construction and operation of their rail lines — or the proceeds from the transfer of those lands or of interests in those lands — have been and will be transferred from the railroads to their parent holding companies at less than fair value. Were the railroads receiving these properties, or their railroad successors in interest, to be deprived of the fruits of these land grants at a time, whether now or in the future, when they are needed to support rail services essential to the public interest, the intention of the Congress in making these grants would be subverted, and today's citizens would lose the benefit of the contract made by their forebears with the land-grant railroads.

INTERSTATE COMMERCE COMMISSION, RAILROAD CONGLOMERATES & OTHER CORPORATE STRUCTURES, A REPORT TO CONGRESS AS DIRECTED BY SECTION 903 OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976, 74 (1977).

cert. denied, 343 U.S. 964 (1952). These obligations were assumed by Santa Fe under the 1897 Act, and later by ATSF pursuant to the 1902 Act.[23]

In imposing this condition, Congress anticipated that the railroads would use the revenues and proceeds from grant lands to provide the rate reductions. Indeed, such use of revenues and proceeds was a primary factor causing Congress to enact Section 321 of the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898, 954-955. Section 321(a) of the 1940 Act eliminated the Government rate preferences for land grant railroads except for military and naval property and personnel moving for non-civil purposes.[24] The 1945 amendment to Section 321(a), Pub. L. No. 256, 59 Stat. 606, eliminated the rate preferences entirely.

Congress recognized that the grant lands had always been tied to the obligation to charge reduced rates:

> The purpose of this bill is to remove the *obligation* of certain railroads *to transport* certain classes of Government traffic *at reduced rates pursuant to the conditions of land grants* . . . .

S. Rep. No. 1208, 78th Cong., 1st Sess. 1 (1944) (emphasis supplied).[25] Thus, Congress anticipated that the

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[23] Section 1 of the 1902 Act, 32 Stat. 405, expressly stated that the status of the Santa Fe railroad as a post route and military road was to be maintained, subject to Government use and rate regulation.

[24] Section 321(b) of the 1940 Act provided that, in order for a land grant railroad carrier to receive the benefits of Section 321(a), it was required to file a release of any claims it may have against the Government with respect to land grants made either to itself or to its predecessor in interest. 59 Stat. 954-955. Since only the present carrier was to file the release, the Section presumed that any land grant interests of a predecessor carrier would have passed to the present carrier.

[25] Congress determined first to reduce, and then eliminate, the rate preferences because it believed that the value of and the pro-

grant lands, or revenues and proceeds therefrom, would stay with the railroads to "subsidize" the Government rate preferences.[26]

The original 1866 Act set forth these multiple purposes for land grants of construction, operation and governmental use and reduced rates. Section 1 directed the Atlantic & Pacific to construct, maintain, and operate a railroad. Section 11 provided that the railroad was to carry Government freight and personnel at reduced rates. Section 20 summarized the object of the Act:

> to promote the public interest and welfare by the construction of said railroad . . . and keeping the same in working order, and to secure to the government at all times . . . the use and benefits of the same for postal, military, and other purposes.

14 Stat. 292. And Section 3 made large grants of public lands to aid in fulfillment of these purposes.[27] Congress

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ceeds from the grant lands had been surpassed by the railroads' foregone revenues from Government rail traffic. *See* H.R. Rep. No. 1910, 77th Cong., 2d Sess. 3 (1942); H.R. Rep. No. 393, 79th Cong., 1st Sess. 4 (1945).

[26] All of Santa Fe's income from its exploitation of the grant lands and reserved mineral interests has been deposited to the bank accounts of affiliated, non-railroad corporations, thereby demonstrating that the objective of the scheme undertaken in 1903 was to separate the benefits of the grant lands from the statutory conditions and obligations.

[27] Congress reaffirmed the multiple purposes of the 1866 Act in connection with the passage of the 1897 Act creating Santa Fe:

> In addition to the plain purpose of thereby promoting settlement of the country through which the road would pass [by construction and operation of the railroad], the Government use and purpose [in the 1866 Act] was, as expressed by Section 11 of the Charter Act [to be a post route and military road, subject to government use and rate regulation].

S. Rep. No. 737, 54th Cong., 1st Sess. 1 (1896). The Senate Report also specifically noted that "the governmental uses and purposes originally reserved in the charter act should be continued in the hands of [the] new parties," *i.e.*, Santa Fe. S. Rep. No. 737, at 2.

intended the land grants to be used to fulfill these multiple purposes. Thus, when Santa Fe accepted the 1902 Act and made the transfer to ATSF, it could not sever the benefits of the Section 3 grants from the conditions and congressional purposes imposed on the railroad.

3. The very nature of Congress' power, and in turn the power conferred by it on Santa Fe, prevented the retention by Santa Fe of only the Section 3 rights for the purpose of engaging in the real estate business. Corporations obtain their existence and powers from the legislature — they are creatures of legislation. *Thomas v. West Jersey R. Co.*, 101 U.S. 71 (1880). As stated by this Court in *Perrine v. The Chesapeake and Delaware Canal Co.*, 50 U.S. 172 (9 How. 92) (1850):

> Now, it is the well-settled doctrine of this court, that a corporation created by statute is a mere feature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence.

50 U.S. at 184 (citations omitted). *See also, Bankers Trust Co. v. Texas & P. R. Co.*, 241 U.S. 295, 305-306 (1916). Railroad corporations are no exception. *See Union P. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U.S. 564 (1896). Because of this status, the general rule is that statutes granting corporate powers, rights, privileges, and immunities are strictly construed in favor of the public interest and against the corporation. *See, e.g., Louisville & N. R. Co. v. Kentucky*, 161 U.S. 677 (1896); *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24 (1891).

When a corporate charter is granted by special act of Congress, it is especially subject to strict construction in order not to offend the Constitution. Congress has no inherent power to create a corporation. Rather, its power flows only from the Constitution. Under article I, section 8 of the Constitution, Congress may create a corporation if its purpose is necessary and proper to effectuate

one of the specific powers conferred on Congress or the government by the Constitution. Congress cannot create a corporation for any other purpose. *See, e.g., Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894); *California v. Central P. R. Co.*, 127 U.S. 1 (1888); *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). Thus, Congress may create a corporation whose purpose is the construction and operation of a railroad pursuant to its powers "to establish post offices and post roads" and "to regulate commerce . . . among the several states." *U.S. Const.* art. I, § 8. *See, e.g., California v. Central P. R. Co.*, 127 U.S. at 39; *Pacific Railroad Removal Cases*, 115 U.S. at 18. Such a corporation has, however, only those powers impliedly necessary to the purpose of its incorporation, *i.e.*, the building and operation of a railroad. *See Wisconsin, M. & P. Railroad v. Jacobson*, 179 U.S. 287 (1900); *Pittsburgh, C. & S. L. R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U.S. 371 (1889). The purpose and powers of a federal railroad corporation must be interpreted to comport with the limitations on Congress' constitutional power to create such corporations.

Moreover, with regard to a corporation's power to hold property, it has been stated:

> [T]he corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. *It holds the property only* for the purposes for which it was permitted to acquire it — that is, *to effectuate the objects for which the Legislature created it.*

Perrine v. The Chesapeake and Delaware Canal Co., 50 U.S. at 184 (emphasis supplied).[29]

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[29] In the context of railroad corporations holding property for other than railroad purposes, it was noted in *Williams v. Johnson*, 208 Mass. 544, 95 N.E. 90 (1911):

Under Section 1 of the 1866 Act, Santa Fe, a federal corporation, was incorporated for the sole purpose of constructing, maintaining, and operating a railroad and telegraph line between designated points. With the transfer of its railroad and other property to ATSF, it no longer was engaged in the construction and operation of a railroad, and no powers necessary or incidental to fulfilling that purpose could exist for Santa Fe. It could not hold the Section 3 rights for purposes other than those permitted. *Case v. Kelly*, 133 U.S. 21, 26 (1890). The retention of the Section 3 rights by Santa Fe for a non-railroad purpose was thus outside the express and implied powers Congress was permitted to, and did, confer on Santa Fe and, accordingly, was *ultra vires* and void.[30]

In addition, Santa Fe did not have any explicit or implied power to transfer the Section 3 grants and rights

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> *When a corporation, created for the purpose of building and operating a railroad, goes into the business* of banking, or manufacturing and selling goods, or *dealing and speculating in real estate* . . . or if a bank should go to building and operating a railroad for like reason, it is easy to see that, in each instance, *the corporation is attempting to transact business which, under its organic act, it has no right or power to do.* (quoting *Waldo v. Chicago, St. Louis & Fond du Lac Railroad*, 14 Wis. 575, 581 (1861)).

95 N.E. at 92 (emphasis supplied).

[30] Moreover, when Santa Fe elected in 1903 to cease being a railroad by transferring its property, rights, powers, privileges, franchises and grants, it no longer had the federal purpose conferred on it by Congress, it had no other recognized federal purpose, and thus ceased by operation of law to be a federal corporation. Congress did not, and indeed could not, confer on Santa Fe the express purpose and power to engage in the real estate business.

In support of its finding that Santa Fe has continued to exist and conduct business (of some nature) since 1903, the appellate court notes that Santa Fe's existence has not been questioned in those cases wherein it has been a party. *See* App. A at 25a. In none of those cases, however, was Santa Fe's existence placed in issue and, accordingly, the courts were not called upon to address the question.

to Santa Fe Development. This is apparent from the very fact that Congress undertook passage of the 1902 Act:

> The object of the [1902 Act] is to permit the Santa Fe Pacific Company to sell or lease its railroad and other property [31] to the Atchison, Topeka and Santa Fe Railway Company . . . .
>
> *The original Act of Congress creating the Santa Fe Pacific Company,* above cited, *does not authorize such sale or lease,* and hence this additional authority is desired.

H.R. Rep. No. 1518, 57th Cong., 1st Sess. 1 (1902) (emphasis supplied). If Santa Fe did not have express or implied power to transfer its property, including its grants, to ATSF, without statutory authorization, it also did not have the power to transfer all of its Section 3 rights to Santa Fe Development without an act of Congress. The only power conferred by Congress in this regard was to make a transfer to ATSF. The unauthorized transfer to Santa Fe Development was thus ineffective. Santa Fe's election to exercise the power conferred by the 1902 Act and transfer all its property, including all grants, to ATSF, transferred the Section 3 grants and rights to ATSF.[32]

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[31] "Other property" was defined in Section 1 of the 1902 Act as "including all rights, powers, privileges, *grants,* and franchises." 32 Stat. 405 (emphasis supplied).

[32] The 1871 Act also demonstrates the extremely limited corporate powers granted to the Atlantic & Pacific, and thus to Santa Fe, by the 1866 Act. The 1871 Act, granting the railroad the power to borrow funds and mortgage its property, was necessary because the power to borrow and mortgage could not be implied from the authorization under the 1866 Act to construct and operate a railroad. So too, the power to sell or lease the railroad and other property could not be implied. Congressional authorization was needed for each of these actions. Given such limited implied powers, the power either to transfer the Section 3 rights to Santa Fe Development or to retain the Section 3 grant lands for purposes of engaging in the real estate business cannot be implied.

As the foregoing demonstrates, the decision of the court of appeals, rejecting the position that Santa Fe could not have retained the Section 3 grants and rights, is incorrect. If not corrected, Santa Fe will have achieved the objectives of the scheme it undertook in 1903 to separate the Section 3 grants from the railroad. Santa Fe will have been able, by means of its scheme, to obtain clear title to all but the surface estate of the more than four million acres covered by its mineral reservation clause. Moreover, Santa Fe will continue to operate a real estate business which Congress never had the power to permit and never intended to occur.

II. The Court of Appeals' Interpretation of the Term "Minerals" Conflicts With Decisions of This Court.

Even if Santa Fe were authorized to sever the Section 3 rights from the railroad and retain benefits by means of the mineral reservation clause, the appellate court's interpretation of that clause directly conflicts with decisions of this Court on interpretation of mineral reservation clauses. The appellate court's mistake is fundamental and unambiguous.

A grant of land by Congress is both a law and a contract regarding conveyance of land. In several instances Congress made grants of land while reserving to the government certain "mineral" rights or "mineral lands." This Court has often finally interpreted reservations in statutory contracts. *See, e.g., Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983); *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526 (1903). *See also, Watt v. Alaska*, 451 U.S. 259 (1981); *United States v. Northern Pacific Railway Co.*, 311 U.S. 317 (1940). In these cases the term "minerals" was *per se* found to be susceptible of more than one interpretation, *i.e., per se* ambiguous. The Court looked beyond the statutory contract for proper interpretation of "minerals."

For example, in *Watt v. Western Nuclear, Inc.*, this Court interpreted the government's mineral reservation clause under the Stock-Raising Homestead Act of 1916 ("SRHA"). The disputed clause, very similar to the one at issue here, provided that "all the coal and other minerals" in lands granted under the Act were reserved to the United States. This Court found the term "minerals" ambiguous. 462 U.S. at 56 ("the ambiguity in the language of the SRHA"); 462 U.S. at 61 (dissent) ("the ambiguity inherent in the term 'minerals' "). As a result, this Court relied upon numerous items of extrinsic evidence. Consideration was given, for example, to "[t]he legal understanding of the term 'minerals' prevailing" at the time that the statutory contract was enacted. 462 U.S. at 44. Consideration was also given to the various expressions of intent and understanding set forth in congressional reports, 462 U.S. at 44, n.5, 45-50; various expressions by government officials relating to the purpose of the reservation of minerals in the context of government legislation other than the SRHA, 462 U.S. at 48-49; and treatment of the substance under "mineral" clauses in other statutes, 462 U.S. at 56-59.[33]

This Court has held as a matter of law that the word "minerals" in a reservation clause with respect to conveyance of lands is ambiguous *per se*, and resort to other evidence of intent must be had. Here, the court of appeals' finding that "minerals" is unambiguous and that the intent of the mineral reservation clause is to be deter-

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[33] Similarly, in *Northern Pacific R. Co. v. Soderberg*, in determining whether granite was included under the proper interpretation of "mineral" as used in the Act of Congress of July 2, 1864 granting to the Northern Pacific Railroad certain lands, but reserving mineral lands to the United States, this Court did not confine its inquiry to the document to determine intent. Rather, it considered extrinsic evidence of such things as the expressions of intent by Congress with regard to the Act, subsequent actions of Congress under other acts utilizing the same term, and acts of government officials in implementing the word in dealing with parties other than those to the suit. 188 U.S. at 531-534.

mined solely by reference to the clause itself, directly conflicts with the decisions of this Court.[34]

With respect to both a conveyance of land by Congress and a conveyance by a private party, information outside the document is necessary to resolve ambiguity and determine intent. In the statutory context, it is relevant to consider such things as any congressional understanding of the term at the time the legislation was enacted or how the term was applied by officers of government agencies and departments. In the private deed context, it is relevant to consider, as was done by the trial court and jury here, such things as any common understanding of the term at the time of execution of the deed, or expressions by the grantor as to the meaning of the term in connection with other land dealings. *See Mapco Inc. v. Pioneer Corp.*, 615 F.2d 297 (5th Cir. 1980).

Thus, the trial court's decision that the disputed substances were not intended to be reserved to Santa Fe is in accord with the decisions of this Court, properly based upon an examination of the relevant extrinsic evidence of the intent of the parties, and must be reinstated.

III. The Presiding Judge's Failure to Recuse Himself Resulted in a Violation of Petitioners' Due Process Rights.

The decision of the court of appeals was made in violation of Canon 3C of the Arizona Code of Judicial Conduct[35] and the Spurlocks' right to due process of law

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[34] In reaching its conclusion, without resort to extrinsic evidence, that the intent was to sever the surface estate, the appellate court relied on *Watt v. Western Nuclear, Inc.*, a case in which that conclusion was reached only after extensive review of extrinsic evidence as to the intent of the use of the term "minerals."

[35] The Code of Judicial Conduct adopted by the American Bar Association, as amended by the Supreme Court of Arizona, governs the courts of Arizona pursuant to Rule 45 of the Rules of the

under the Fourteenth Amendment to the Constitution of the United States because the presiding judge had personal knowledge of disputed evidentiary facts concerning the proceedings. The Code of Judicial Conduct is a mandatory set of rules having the force and effect of a statute creating rights in the litigants. *See Weil v. Neary*, 278 U.S. 160 (1929); *Woods Construction Company, Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888 (10th Cir. 1964).

Immediately after this case was briefed on appeal and assigned to a panel, Spurlocks' counsel became aware that the assigned presiding judge, Judge Haire, had during 1959 to 1963 been involved as a practicing lawyer in most of the critical facts of this case. During this period Judge Haire was attorney for the receiver of Apache Oil and Helium Corporation ("Apache"), the primary assets of which were profits from leases covering helium deposits in the Pinta Dome geological formation located partially on the Spurlock ranch and adjacent to the Navajo Springs geological formation at issue in this case. The leases owned by Apache included a lease with the Spurlocks, and in 1956 these leases were assigned to Kerr-McGee, with Apache retaining a profit interest.

The treatment of helium under the leases and mineral reservation clauses affecting the Pinta Dome formation was a major disputed evidentiary area. As counsel for the Apache receiver, Judge Haire was called upon to review a great number of documents which later became

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Supreme Court of Arizona. Canon 3C of the Code provides in relevant part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

exhibits in this case. He participated in conferences, correspondence, and contractual dealings with some of the parties and many of the key witnesses in this case regarding the helium deposits on the Spurlock ranch.

Spurlocks' counsel immediately corresponded with Judge Haire and suggested that he consider recusing himself. Judge Haire responded by letter to counsel stating that he had gone to his former law firm's office [36] and spent several hours reviewing the files relating to his prior involvement. Judge Haire further stated that, after reviewing those files, he concluded that since he had not expressed an opinion on the issues which subsequently arose in this lawsuit he would not recuse himself.

Having refused recusal, Judge Haire presided over the case and participated in the decision which reversed the trial court's judgment on critical issues. The Spurlocks' motions and petitions before the Supreme Court of Arizona seeking review of this issue were denied. *See* App. D at 66a; App. E at 68a.[37] The Spurlocks now seek a determination that Judge Haire's failure to recuse himself resulted in a violation of due process of law and, for this reason, the decision of the court of appeals cannot stand.

Canon 3C of the Arizona Code of Judicial Conduct is identical in all material respects to 28 U.S.C. § 455 (1982).[38] Section 455(a) establishes the all-inclusive ob-

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[36] Judge Haire's former law firm represented Kerr-McGee during the first seven years of this case.

[37] The Spurlocks filed a Motion for Reconsideration of Order Denying Petition for Review, a Petition to Recall Mandate, and a Motion for Reconsideration of Order Denying Petition to Recall Mandate.

[38] In 1972, the House of Delegates of the American Bar Association adopted a new Code of Judicial Conduct which advocated the "appearance of justice" standard for judicial disqualification. *See* Note, *Disqualification of Judges & Justices in the Federal Courts,*

jective standard that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." [39] Section 455(b) further provides that a judge "shall disqualify himself . . . where he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." Under section 455 the judge is required to recuse himself if a reasonable person knowing all the circumstances would harbor doubts about his impartiality. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

Provisions such as section 455 and Canon 3C flow from the requirements of due process of law. *See* Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 Cal. L. Rev. 1445, 1447 (1981). This Court has repeatedly held that if a judge's participation created the appearance of bias, prejudice, or partiality, the party was denied due process of law. *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *In re Murchison*, 349 U.S. 133, 136 (1955). The Supreme Court of Arizona has adopted an identical position. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). Failure to recuse under these circumstances presents a question "of so grave a character, and involving considerations of public importance," so that a writ of certiorari should issue "without at all considering, for the purpose of such allowance, the questions urged concerning the merits of the cause." *Wm. Cramp & Sons v.*

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86 Harv. L. Rev. 736 (1973). In 1974 Congress enacted section 455, which codified this standard. H.R. Rep. No. 1453, 93rd Cong. 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Ad. News 6351, 6352.

[39] Section 455 overrides the precept that close cases involving disqualification should be resolved on the ground that a judge has a "duty to sit." H.R. Rep. No. 1453, *supra*, at 5. The "duty to sit" is replaced by a duty of disqualification if there is any question about the propriety of the judge's sitting. *Hall v. Small Business Admin.*, 695 F.2d 175, 178-179 (5th Cir. 1983).

International Curtis Marine Turbine Co., 228 U.S. 645, 650 (1913).[40]

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the Court of Appeals of the State of Arizona.

Respectfully submitted,

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[40] A denial of due process also occurred in the manner in which Judge Haire made his decision not to recuse himself. Judge Haire made an out-of-court examination of the files of his former law firm, which were never made available to the Spurlocks or their counsel. This in effect made Judge Haire "a judge in his own case." *See, e.g., SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116-117 (7th Cir. 1977).